SUPREME COURT, U. S.

AUG 9 1973

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-264

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, and Its LOCAL NO. 171,
Petitioners,

vs.

SAM KANE PACKING COMPANY, SAM KANE WHOLESALE MEAT, INC., and SAM KANE MEAT, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
Appendix A Statutory Provisions Involved	A-1
Appendix B Opinion of the Fifth Circuit Court of Appeals	A-3
Appendix C Memorandum of the U. S. District Court	A-19
Appendix D Arbitrator's Decision and Award	A-28

Table of Cases

Local 174, Teamster v. Lucas Flour Co., 369 U.S. 95 .. 9

Steelworkers Trilogy: Warrior & Gulf, 363 U.S. 574; American Mfg., 363 U.S. 564; and Enterprise Wheel, 363 U.S. 593 ..... 9, 10

Textile Workers v. Lincoln Mills, 353 U.S. 448 ..... 9, 10

Miscellaneous Cited

Annual Reports of the Director of the Administrative Office of the United States Courts, 1971, 1972 12

Bureau of National Affairs, AAA's Expedited Arbitration Plan, Labor Relations Yearbook—1972, at 39 (1973) 11

Bureau of National Affairs, Basic Contract Patterns: Grievances, Arbitration, Labor Relations Yearbook —1970 (1971) 10

Bureau of National Affairs, Ex Parte Arbitration, Labor Relations Expediter 28 (1972) 11

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New Directions in Grievance Handling and Arbitration, 95 Monthly Labor Review, No. 11, Nov. 1972 10

U. S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1425-6, Major Collective Bargaining Agreements —Arbitration Procedures (1966) 10, 11

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The petitioners, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, and its Local No. 171, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 16, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit, — F.2d —, 83 LRRM 2298, is reprinted in Appendix B.

The Opinion of the United States District Court for the Southern District of Texas, — F.Supp. —, 83 LRRM 2294, is reprinted in Appendix C.

The Decision and Award of Arbitrator Bernal is reprinted in Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 16, 1973, and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1

Is a union entitled to enforcement under §301 of the Labor-Management Relations Act of an award issued by a union-appointed arbitrator acting alone pursuant to a collective bargaining agreement which provided that if either party failed to participate "then the arbitrator so appointed by the other party shall promptly arbitrate and settle such grievance and his decision or decisions shall be final and binding upon the parties"?

2

In the light of the federal policy favoring labor arbitration, and the "final adjustment" of labor disputes "by a method agreed upon by the parties," 29 U.S.C. §173(d), did the Court of Appeals err in holding that the clause of the contract providing for default arbitration must be "construed strictly" and viewed as a "harsh penalty" which "has fallen out of the contract"?

STATUTORY PROVISIONS INVOLVED

We reproduce in Appendix A (A-1), *infra*: United States Code, Title 29, §185, which grants jurisdiction to federal district courts of "suits for violation of contracts between an employer and a labor organization"; and §173(d) which declares:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . ."

STATEMENT OF THE CASE

Respondent Kane (herein "employer") and Petitioners (herein "union") were parties to a collective bargaining agreement which provided a grievance procedure and for arbitration of unresolved grievances.

The agreement called for a three man arbitral body, each party to select one within specified short time limits, and those two to select a third.

Recognizing the need for expedition, and to assure prompt resolution of grievances, the agreement specifically provided:

> "If either the Company or the Union fails to appoint their respective arbitrator within said one (1) week period, then the arbitrator so appointed by the other party shall promptly arbitrate and settle such grievance or grievances, and his decision or decisions shall be final and binding upon the parties."

Forty-two employees filed grievances protesting their discharges. The employer claimed "slowdowns" and "in-

tentionally sloppy work" and "work stoppage" and "strike," while the employees claimed "lockout" and "discharge."

The union's attempt to utilize the contractual grievance and arbitration procedure was met by the employer's "statement that the matter was not subject to arbitration, that the workers would not be allowed to return [to work, since they] had been discharged and replaced."[1]

The union demanded arbitration, and designated as its arbitrator the Honorable Joe J. Bernal,[2] and "repeatedly notified the company to appoint an arbitrator so that a third could be chosen. The company consistently refused to agree that arbitration was required."[3] So Arbitrator Bernal noticed the matter for arbitration hearing at a specified time and place. The company, however, obtained an *ex parte* restraining order from the United States District Court preventing the arbitration.

The restraint was dissolved upon hearing of application for temporary injunction, for Norris-LaGuardia forbade injunction except in the narrow circumstance where petitioner was ready to proceed with arbitration at the time the injunction was sought. *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970). And this employer was adamant that ". . . there is no arbitration whatsoever

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[1] Opinion of Court of Appeals, Slip Opinion, p. 3, Appendix B, p. A-5, *infra.*

[2] Mr. Bernal is a distinguished citizen of San Antonio; then a State Senator. The Court of Appeals is at pains to note his integrity, note 4, Slip Opinion, p. 19. Appendix B, *infra,* p. A-17.

[3] As found below, Slip Opinion, p. 5, Appendix B, *infra,* p. A-6. Actually, the employer's letter insisted "There is no pending arbitration. . . . You (Arbitrator Bernal) are not an arbitrator of any matter between the above named employer and the above named union for the reason that there is no matter being arbitrated or now subject to arbitration or now eligible for arbitration between them. . . ." Joint Appendix, Court of Appeals, p. 122.

pending, nor any matter currently eligible for arbitration between our client [employer] and yours [union]."[4]

The district court noted that the employer's counsel after redundantly stating that there was no arbitration, wrote:

> "If and when any matter for arbitration is properly brought, the company appoints the undersigned as its arbitrator. At the present time, there is no matter eligible for arbitration or before us for arbitration and I believe it silly to pretend otherwise";[5]

but the District Court properly concluded: "The assertions made by Alberts [employer's counsel] that, in a proper arbitration proceeding he is the arbitrator for the plaintiffs, stands for nothing."[6]

Upon the dissolution of the restraint, arbitrator Bernal again invited Alberts to participate, and advised the parties that the arbitration would be resumed at a specified time and place.

Again the employer refused to participate, and asserted there was "no pending arbitration." So "arbitrator Bernal conducted a full proceeding with those present . . . [and] about three weeks later issued a lengthy opinion finding that the company unfairly locked out the employees and ordering reinstatement with pay and benefits."[7]

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[4] Joint Appendix, Court of Appeals, p. 112—Alberts' letter of August 9. The Court of Appeals notes (Note 5, Slip Opinion, p. 20, Appendix B, *infra*, p. A-18), that the employer made no attempt to "enjoin the arbitration on the ground that it was 'one-sided'."

[5] *Ibid.*, p. 114. See Appendix C, *infra*, p. A-22.

[6] *Ibid.*, p. 54; Appendix C, *infra*, p. A-23.

[7] Cir. Ct. Opinion—Slip Opinion, pp. 5-6; Appendix B, p. A-7, *infra*.

When the employer refused to comply with the award the union sued to enforce it.[8] The District Court found the matter arbitrable under the contract, and held that "the assertions by Alberts that, in a proper arbitration proceeding, he is the arbitrator, stand for nothing." The District Court thus realistically viewed the situation as one where the union arbitrator was properly appointed, but the employer had failed to appoint its arbitrator.

Thus the District Court applied the default arbitration provision of the contract quoted above, and enforced the award. The employer appealed.

The Fifth Circuit held that the matter was arbitrable, but refused to enforce the award, holding that there could be no single party arbitration where the opposing party refuses to proceed.[9]

The Court of Appeals holds that ". . . the union should have sought an order from the district court compelling the company to follow the contractually agreed to procedures." For, in the view of the Court of Appeals the default arbitration proceeding was "to a degree . . . in con-

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[8] The employer's original suit to enjoin the arbitration was still pending, awaiting trial on the merits. The union filed a counterclaim in that pending suit. Federal jurisdiction arises under 29 U.S.C. § 185.

[9] The Circuit Court holds that the mere naming of a representative who refuses to act (either as "arbitrator," or as "employer attorney") removes the single party arbitration provision from the contract, viz.:

> "Once each side has named a representative we think the harsh penalty involved in allowing single party arbitration has fallen out of the contract." (Slip Opinion, p. 18; Appendix B, *infra*, p. A-16).

The Court of Appeals finds as fact that attorney Alberts "was designated employer representative *if any arbitration was going to take place* (emphasis added). Yet Mr. Alberts, speaking for himself as arbitrator, *and for the company* (emphasis added) consistently took the position that the dispute in this case was not arbitrable under the contract." Slip Opinion, p. 16; Appendix B, p. A-15, *infra*.

flict with the concept of true arbitration," represented a "harsh penalty" and "extreme sanction" the "over-extension [of which] could create more hostility in contravention of the aim of peaceful settlement of industrial disagreements."[10]

The Court of Appeals took no account of the true reason for the default arbitration procedure, i.e., to require *prompt* resolution of industrial disputes. To the contrary, it expressly held that rather than apply the cited provision, the union "should have requested the Court to order the employer to follow contract procedures and select an arbitrator."[11]

The court-suggested procedure is the antithesis of the contract procedure. To proceed as the court suggests would have meant that grievances arising in July 1971 would have been presented to an arbitrator either after May 18, 1972 (the date of the District Court's decision), or more likely, in the event of appeal, after May 16, 1973, the date of the Circuit Court's Opinion.

Witnesses disappear and memories dim in the time interval which the Court of Appeals requires before the arbitration can proceed. Both parties recognized as much, and so wrote the "default" procedure which the Court of Appeals has written out of the Agreement. Forty-two employees should not be required to live petrified in "discharge" status while the question of whether arbitration is available to them is bogged in overcrowded court docket.

Both employer and union at the time the contract was negotiated believed such delay intolerable.

Accordingly, they contracted for prompt arbitration. Quite apart from the individual hardship visited upon the

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[10] Slip Opinion, pp. 18-19; Appendix B, pp. A-16–A-18, *infra*.

[11] Note 5, Slip Opinion, p. 20; Appendix B, p. A-18, *infra*.

workers who must find food, shelter, and a living in the interim required to decide their case, the parties knew that union grievances smoldering for a year, or two, or more, made for bad labor relations. Indeed, the employer knew that its grievances against improper employee or union conduct necessarily required immediate resolution. It was precisely to avoid the delays inherent in going to court that both employer and union agreed to the default "single-arbitrator" procedure.

So viewed the contract provision is not, as the Court of Appeals held, "in conflict with the concept of true arbitration." Rather it is in aid of the basic federal labor relations policy of prompt resolution of grievance disputes by a method agreed upon by the parties.

REASONS FOR GRANTING THE WRIT

1

An important federal policy is involved in the peaceful settlement of disputes through favored private arbitration procedures. The decision below runs counter to the federal policy of encouraging labor arbitration as a mechanism for the *expeditious* settlement of industrial disputes. "This basic purpose is obviously largely undercut if there is no immediate, effective remedy. . . ." *Boys Market v. Retail Clerks*, 398 U.S. 235, 249.

If, as this Court observed in *Boys Market*, arbitration is the central institution in the administration of collective bargaining contracts, procedural devices selected by the parties to expedite the arbitration process and written into the agreement should be favored, not viewed as having "fallen out of the contract."

The default arbitration mechanism is a remedial device that merely effectively enforces the obligation that management and labor each freely undertook when they negotiated the collective bargaining agreement. The decision below which refuses to implement that obligation runs counter to the direction this Court has taken since *Lincoln Mills*,[12] in the *Steelworker Trilogy*,[13] and *Lucas Flour*.[14]

2

It is important to the administration of the federal labor laws that prompt grievance arbitration proceed—and that the procedures for expedition written into collective bar-

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[12] *Textile Workers v. Lincoln Mills*, 353 U.S. 448.

[13] Steelworkers Trilogy: *Warrior & Gulf*, 363 U.S. 574; *American Mfg.*, 363 U.S. 564; and *Enterprise Wheel*, 363 U.S. 593.

[14] *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95.

gaining agreements be implemented—not frustrated. Although this Court's writings beginning with *Lincoln Mills* and the *Steelworker Trilogy* have pointed toward a federal policy of implementing labor arbitration, this Court has not decided the important question of federal law presented in this case. Increasingly, parties to collective bargaining agreements are devising contract procedures designed to attain *prompt* arbitration, viz.:

> "Since 1966, a marked uptrend has developed in the frequency of collectively bargained stipulations attaching time limits of five days or less to the initiation of rank-and-file grievances.
>
> . . .
>
> Unresolved grievances are committed to arbitration under 94 percent of current contracts—down slightly from 96 percent in 1966. Only 1 percent of current arbitration provisions require mutual agreement, with the remainder stating or implying that arbitration is to follow automatically after the grievance procedure has been exhausted and may be invoked by either party. Arbitration provisions appear in 95 percent of manufacturing contracts and in 94 percent of nonmanufacturing agreements."

Bureau of National Affairs, *Basic Contract Patterns: Grievances, Arbitration,* Labor Relations Yearbook—*1970* at 37, 38 (1971). Cf. U. S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. *1425-6,* Major Collective Bargaining Agreements—Arbitration Procedures at 27-38 (1966). And more recently, see *New Directions in Grievance Handling and Arbitration,* 95 Monthly Labor Review, No. 11, Nov. 1972, at 3-30, and particularly, Power, *Improving Arbitration, id.* at 15-22, where current problems of arbitration and delay are discussed.

Validation, and enforcement of agreements to expedite labor settlements are of general concern. The Voluntary

Labor Arbitration Rules of the American Arbitration Association—in constant use by hundreds of unions and employers provide for a form of default arbitration: Rule 27 of the Voluntary Rules states:

> "Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who after due notice, fails to be present or fails to obtain an adjournment. . . ."[15]

The mere existence and enforcibility of these and other default arbitration clauses[16] serve to prod the parties to expeditious arbitration. To obliterate—or to refuse to enforce them—or to require the dispute to remain unresolved pending obtaining a court order to arbitrate before such provisions may be utilized, is to frustrate and stultify the prophylactic process which the Congress and this Court have designed to minimize industrial disputes.

"Single-party" or "default" arbitration provisions are designed to require *prompt* hearing and decision of current labor relations problems. Workers cannot afford the luxury of the gestation period of August to May required for a District Court to reach, hear and determine that arbitration may proceed in accordance with their contract. A basic reason for labor arbitrations is that it is prompt. Witnesses' recollections are good; indeed, witnesses are still in the locality and available in days or weeks; they are not in the months or years involved if the union must "have sought an order from the district court compelling the company to follow the contractually agreed to procedures." Slip Opinion, p. 18, Appendix B, p. A-17, *infra*.

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[15] Cf. Bureau of National Affairs, *AAA's Expedited Arbitration Plan*, LABOR RELATIONS YEARBOOK—*1972*, at 39 (1973), and see *FMCS Report on Mediation, Arbitration in Fiscal 1971, id.* 266-268.

[16] Cf., Bureau of National Affairs, *Ex Parte Arbitration*, LABOR RELATIONS EXPEDITER 28 (1972) and cases cited therein; and U.S. Bureau of Labor Statistics, *Bull. No. 1425-6, supra*, at 27-51.

3

Federal court dockets are clogged. District Court cases under the Labor Management Relations Act rose from 1,475 in 1970 to 2,101 in 1971 to 2,454 in 1972. Private actions under this statute rose from 1,841 in 1971 to 2,123 in 1972.[17] Invalidation of contract procedures designed to obtain prompt arbitral determination—and requiring court sanction preliminary to arbitration merely adds to this congestion. On the other hand, to channel the dispute to prompt arbitration will usually result in prompt settlement of the dispute.

Wherefore, petitioners pray that certiorari be granted, and that upon review the Circuit Court be reversed and the default arbitration provisions be held valid.

Respectfully submitted

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[17] Annual Reports of the Director of the Administrative Office of the United States Courts, 1971, pp. 264, 269; 1972, pp. A-13, A-15.

These figures are not broken down to isolate § 301 actions from those brought either under Section 303 or Section 160 NLRB injunction actions. Accordingly, there are no precise figures for Sec. 301 actions. A spot check of recent Labor Advance Sheets indicates that by far the largest number of cases under LMRDA are brought under Sec. 301 to enforce labor contracts.